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No. 814

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MILTON J. SHAPP,

Appellant,

against

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Southern District of New York, entered October 4, 1966, which denied appellant's request for an interlocutory injunction enjoining the operation of, and the taking of any steps to make effective, orders of the Interstate Commerce Commission (Commission) authorizing the merger of Pennsylvania Railroad Company (PRR) and New York Central Railroad Company (NYC). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below

The majority and dissenting opinions of the three-judge United States District Court for the Southern District of New York are not yet reported. Copies of the

opinions are attached as Appendix A to the jurisdictional statement heretofore filed in No. 642, Baltimore and Ohio Railroad Company, et al., against the United States of America, et al., and are incorporated herein by reference to avoid unnecessary duplication.

The report and order of the Interstate Commerce Commission, dated April 6, 1966, are reported at 327 I.C.C. 475. The report and order of the Interstate Commerce Commission on reconsideration, dated September 16, 1966, are reported at 328 I.C.C. 304. A further order, dated September 29, 1966, setting further hearings in these proceedings, is not reported, but copy thereof is attached as Appendix C to the aforesaid jurisdictional statement of The Baltimore and Ohio Railroad Company, et al., to which reference is hereby made.

Jurisdiction

The action below was instituted by Erie-Lackawanna Railroad Company (E-L) on September 8, 1966, under 28 U.S.C. 1336, 1398, 2284 and 2321-25, to permanently enjoin, annul or set aside orders of the Interstate Commerce Commission which approved the merger of PRR and NYC. The action was consolidated for all purposes with two other actions brought by other railroads involving the same orders of the Interstate Commerce Commission.

On September 12, 1966, Milton J. Shapp petitioned for leave to intervene and the motion for leave to intervene and to file his attached complaint was granted.

The intervention of Milton J. Shapp was brought under Title 28 U.S.C. 1336, 1398, 2284 and 2321-25, Title 5 U.S.C. 1009, and Title 49 U.S.C. 1, et seq. and particularly 17(9).

The order of the District Court, denying an interlocutory injunction was entered on October 4, 1966. Notice of appeal was filed in that court by Milton J. Shapp on October 28, 1966.

Jurisdiction of the Supreme Court is conferred by 28 U.S.C. 1253 and 2101(b).

Questions Presented

1. Is it an abuse of discretion to deny an interlocutory injunction to maintain the status quo when serious and difficult questions of law and mixed questions of law and fact remain to be resolved about contested administrative action, and the contemplated action involves tremendous changes having a grave impact upon the parties, upon innumerable local communities, upon many States and upon the very Nation itself?

2. Do not the following illustrative points present serious questions upon which appellant reasonably may prevail on final hearing, and which also appear to have been so clearly erroneously decided by the Commission as to require that its orders be set aside or remanded to the Commission without further proceedings in the district court?

(a) the economic projections utilized by the Commission were unsound and have been shown to be erroneous by actualities;

(b) in lieu of using the current applicable standards for approval of the merger, the Commission used a superseded statutory formula plus a vague public benefits test;

(c) the anti-competitive consequences of the proposed merger were neither properly analyzed nor properly evaluated by the Commission;

(d) a full hearing on inclusion of the New Haven Railroad, traffic conditions of the merger, consolidation with other proceedings and the right of judicial review are important matters precedent to any final ruling on the validity of the merger.

3. Can an aggrieved individual, properly a party by legislative sanction as a citizen and shareholder, rely on irreparable harm to shareholders as a class and as a citizen of a State so as to justify the grant of an interlocutory injunction?

Statutes Involved

The following statutes are involved in this case: 28 U.S.C. 1253, 1336, 1398, 2284, 2321-2325; 49 U.S.C. preceding section 1, 5(2) 5b; 5 U.S.C. 1006, 1007 and 1009. The complete texts of these statutes are set forth in the jurisdictional statements in Nos. 642, 680 and 691.

Statement of the Case

This is an appeal from an order of the United States District Court for the Southern District of New York denying an interlocutory injunction against orders of the Interstate Commerce Commission which approve and permit the consummation of the merger of NYC and PRR.

Appellant, Milton J. Shapp, is a PRR stockholder and a citizen of the Commonwealth of Pennsylvania. As an active opponent of the merger at all stages in the proceedings before the Interstate Commerce Commission, he became a party by way of intervention in the district court.

His position was that the orders of the Commission, authorizing the merger, would operate to his substantial damage and irreparable injury, both as a stockholder of PRR and as a citizen and resident of the Commonwealth of Pennsylvania.

A total of nineteen plaintiffs and intervenors filed complaints in the Southern District of New York seeking to set aside the orders of the Interstate Commerce Commission which had approved the merger. Ten of these plaintiffs and intervenors were railroads; eight were communities located in the Commonwealth of Pennsylvania and State of New Jersey; and the remaining intervening

plaintiff was Milton J. Shapp. All of the complaints sought an interlocutory injunction against consummation of the merger, pendente lite, so as to preserve the status quo during completion of judicial review of the Commission orders.

The district court on October 4, 1966 denied these requests for an interlocutory injunction in an opinion written by two of the judges, with the third member of the panel dissenting. The lengthy opinion of the majority is devoted almost exclusively to the arguments urged by the ten railroad plaintiffs, the only mention of the eight plaintiff communities and Milton J. Shapp being as follows:

> "Shapp and the Borough of Freedom and City of Scranton also intervened as plaintiffs." (No. 642, J.S. A-7)

> "The complaints of Shapp and the Borough of Freedom and City of Scranton, the only parties attacking the merger as such, afford no warrant for a temporary injunction, since they fail on all of the points listed." (No. 642, J.S. A-17)

Appellant, as well as eight railroads and eight communities, filed application for stay of consummation of the merger with this Court which was granted on October 18, 1966 in a *per curiam* order.

The Abuse of Discretion in Denying the Interlocutory Injunction

The questions presented by this appeal are substantial because they raise serious issues of law and because appellant, Milton J. Shapp, and others will suffer irreparable harm if the merger proceedings are not halted by an interlocutory injunction.

The jurisdictional statement filed in No.____, City of Scranton, et al., against United States of America, presents many of the same questions as are contained herein.

Appellant Milton J. Shapp respectfully directs the attention of the Court to the substantiality of the questions as shown in that document.

The Irreparable Harm to Shapp and Others as Shareholders and Citizens

Even in *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n*, 259 F. 2d 921 (D.C. Cir. 1958), upon which the district court relied, it is acknowledged (p. 924):

> "Parties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review."

The appellant, therefore, is asserting his harm and the harm of others in his position as a stockholder and as a citizen and resident of the Commonwealth of Pennsylvania, and on that basis it becomes clear that there is irreparable harm by the proposed merger.

As a stockholder, if the merger were ultimately determined to have been improperly authorized, there would be immeasurable cost in untying this tremendous economic and physical intermingling of assets.

The proposed merger would produce a serious economic hardship for the citizens of the Commonwealth of Pennsylvania. The plan of merger is to divert all PRR through-traffic originating or terminating west of Columbus and Youngstown, Ohio, on the one hand, and north and east of Linden, N.J., on the other hand, to the water-level route of NYC across the State of New York. The merger would eliminate one-third of the present PRR freight train miles. Communities, such as Altoona, Harrisburg, Lancaster, Oil City, Sharon, New Castle, Williamsport and Pittsburgh, would lose from 18 to 73 percent of daily through-freight service as now provided by PRR.

The merged railroad would use Ashtabula, Ohio as its principal port on Lake Erie rather than continue PRR's

present facilities at Erie, Pa. The Port of Philadelphia will suffer irreparable damage since the concentration of traffic via NYC routes will reduce the number of trains routed through Philadelphia or via the Thorndale-Morrisville cut-off. At the same time, the proposed merger will favor the Port of New York over the Port of Philadelphia for export and import commerce.

The petition of Milton J. Shapp for reconsideration of the April 6, 1966 report is part of the pleadings in the District Court. This petition contains the details of the injury to citizens of Pennsylvania upon consummation of the merger. It is part of the joint appendix to the briefs in this docket and in No.____, City of Scranton, et al. against United States of America.

The loss of competition between PRR and NYC, together with the operational plans for the proposed merged system, would place Pennsylvania at a distinct disadvantage in the fierce struggle to attract new industry, or to maintain existing plants. Transportation is a vital factor in the location of industry.* The merger would adversely affect employment and have a serious impact upon many communities. The overall effect upon citizens of Pennsylvania would also be to require greater payments by local and state agencies to assist citizens adversely affected by the merger, directly or indirectly, and at the same time reduce tax revenues.

I. THE SERIOUS NATURE OF THE LEGAL QUESTION

The district court applied the test for an interlocutory injunction set forth in *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n*, 259 F. 2d 921 (D.C. Cir. 1958) with a statement that the decision has been frequently

*A current article on the emergence of Chicago as the leading steel center, replacing Pittsburgh, is *Billions build Chicago into a Steel Titan*, Business Week, No. 1942, pp. 68-75, November 19, 1966.

cited. (No. 642, J.S. A-16) On this basis, the district court held that the complaints of Shapp and the Borough of Freedom and City of Scranton failed to meet the test required for an interlocutory injunction. (No. 642, J.S. A-17)

A review of the citations, however, reveals that *Virginia Petroleum Jobbers Ass'n*, supra, has not been cited in any decision of this Court. The cases shown in Rule 15(g) of this Court indicate that the real question governing an interlocutory injunction is whether the issues raised involve serious and substantial matters going to the validity of the Commission's orders. *Mayo* v. *Lakeland Highlands Can. Co.*, 309 U.S. 310, 316-17 (1940). The test of the *Petroleum Jobbers* case relied upon by the court below goes too far in requiring a petitioner to make "a strong showing that it is likely to prevail."

The district court, itself, elsewhere in its majority opinion appears to recognize that the important consideration is the existence of truly serious doubts as to the validity of the merger.* (No. 642, J.S. A-15, A-16, A-18, A-19)

There has been no contention by any party that the arguments advanced by Milton J. Shapp and by the Pennsylvania and New Jersey communities are frivolous. The Commission, itself, in both reports devoted substantial attention to some of the issues raised by protestant Milton J. Shapp. The questions presented by this appeal are likewise substantial. Most of them are discussed in the petition for reconsideration filed July 11, 1966 with the Commission, which petition is part of appellant's complaint in the district court and which is also part of the appendix to appellant's brief being filed contemporaneously herein. Incorporated herein by reference is the discussion of the substantiality of the questions contained in the jurisdictional statement filed in No.____, *City of Scranton, et al.* v. *United States.*

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*Cf. Motion to Advance filed in No. 642 and Motion to Advance filed in No. 691.

As a stockholder of PRR and as a citizen of the Commonwealth of Pennsylvania, appellant will be irreparably injured by the proposed merger. In addition, appellant will be deprived of the right to judicial review of the agency action if the merger is consummated. A railroad merger differs from the usual administrative proceeding in that the status quo cannot be restored once consummation of a railroad merger has been effectuated. The statutory scheme contemplates, however, that there may be orderly and *effective* judicial review of the Commission's orders. *Florida East Coast Railway Company* v. *United States*, 228 F. Supp. 340, 343 (M.D. Fla. 1964)

The district court abused its discretion in denying an interlocutory injunction because it proceeded upon an erroneous concept of the governing requirements and, further, did not explain the basis for sustaining the Commission's order with respect to the issues raised by Milton J. Shapp and intervenor Pennsylvania and New Jersey communities.

Conclusion

For the reasons stated herein, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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